LEGISLATION

Alcoholic Beverage Tax

P.L. 1997, c.153—Tax on Apple Cider Reduced
(Signed into law on July 1, 1997) Reduces from $0.70 per gallon to $0.12 per gallon the tax rate on apple ciders which have an alcohol content by volume of at least three and two tenths percent (3.2%) but not more than seven percent (7%). This legislation takes effect November 1, 1997.

Corporation Business Tax

P.L. 1997, c.40—Rate Decrease for S Corporations
(Signed into law on March 27, 1997) Reduces the tax rate for New Jersey S corporations to 2%, or 0.5% for S corporations with annual net income of $100,000 or less. The change is effective for accounting years ending on or after July 1, 1998.

Gross Income Tax

P.L. 1996, c.60—Property Tax Deduction/Credit
(Approved July 4, 1996) Provides a gross income tax deduction or a refundable credit for eligible homeowners and tenants who pay property taxes either directly or through rent. Benefits will be phased in over a three year period. For the 1996 tax year, eligible residents may deduct 50% of their property taxes due and paid or $2,500, whichever is less. For tenants, 18% of rent due and paid during the year is considered property taxes paid. As a minimum benefit to taxpayers, the law provides for a refundable credit of $25.

For 1997, the deduction will be 75% of property taxes due and paid or $5,625, whichever is less and the minimum benefit will be $37.50. For 1998 and thereafter, the deduction will be 100% of property taxes due and paid or $10,000, whichever is less. The minimum benefit will be $50.

Insurance Premiums Tax

P.L. 1997, c.41—**New Jersey State Firemen's Association**
(Signed into law on March 27, 1997) Revises procedures for the collection and distribution of funds by the New Jersey State Firemen's Association. The legislation takes effect July 1, 1997.

Local Property Tax

P.L. 1996, c.62—New Jersey Urban Redevelopment Act
(Signed into law on July 12, 1996) Creates the New Jersey Redevelopment Authority (NJRA) to assist in the revitalization of New Jersey's urban areas. The NJRA is given bonding authority with an annual bonding cap of $100 million.

In addition, the Act creates a framework under which properties declared as abandoned based on their condition may be acquired in an abbreviated manner and redeveloped. The Act also authorizes the use of payments in lieu of taxes as a financing method for redevelopment projects.

The legislation also establishes a neighborhood empowerment program through which certain municipalities may be made eligible for financial assistance from the NJRA. This new statute also sets forth procedures for remediating contaminated properties. The Act appropriates $9 million from the General Fund to the NJRA and $1 million from the General Fund to the Office of Neighborhood Empowerment. This legislation is effective on the 60th day following enactment except for the section establishing the New Jersey Redevelopment Authority, which is effective immediately.

P.L. 1996, c.82— Tax Exempt Status of Veterans' Organizations
(Signed into law on July 25, 1996) Permits war veterans' organizations to conduct certain income-producing activities and retain property tax exempt status. This bill was designed to preserve the tax exempt status of veterans' organizations, even if these entities use their property for an income-producing purpose on an auxiliary basis, if all net proceeds from such auxiliary activities are utilized in furtherance of the purpose of the organization or for other charitable purposes. This legislation is effective immediately and retroactive to January 1, 1994.

P.L. 1997, c.30—Veterans'/Senior Citizens' and Disabled Persons' Property Tax Deductions
(Signed into law on March 7, 1997) Eliminates the provisions of P.L. 1995 c.259 which require the Division of Taxation annually to furnish each municipality with a supply of application forms for the veterans' property tax deduction as well as the senior citizen, disabled person and surviving spouse property tax deduction.

This legislation also removes from the Division of Taxation and restores to the municipal tax collector the responsibility for mailing to each recipient of a property tax deduction the required post-tax year statement of income form accompanied by a return receipt envelope addressed to the municipality.

The legislation also requires the State to reimburse each local taxing district 102% of the amount of the deductions granted under these programs, rather than 100% as currently required. The additional two percent will compensate taxing districts for the costs of administering the programs.

The legislation is effective immediately and is applicable in tax year 1997 and thereafter.

Miscellaneous

P.L. 1996, c.121—Repeal of Mandatory Employer Trip Reduction Programs
(Signed into law on November 1, 1996) Repeals mandatory employer trip reduction programs and authorizes tax benefits for voluntary programs. The tax benefit provisions are set forth in Sections 6 and 7 of the Act.

Section 6 amends C.27:26A-15 which allows employers a credit based upon the cost of "commuter transportation benefits" provided to employees. In general, the credit allowed is equal to 10% of the cost of such benefits, but not in excess of a per employee limit determined by multiplying $100 by the number of employees participating in alternative means of commuting to work.

However, under this legislation, an employer which filed a certified compliance plan with the Department of Transportation required by Section 5 of P.L. 1992, c.32 (C.27:26A-5) on or before May 31, 1996, will be allowed a credit equal to 15% of the commuter transportation cost subject to a per employee limit of $150. This one-time increase applies to accounting periods that end on or after July 31, 1996, but not later than June 30, 1997.

Section 7 amends C.54A:6-23 of the Gross Income Tax Act by increasing the exclusion for employer-provided commuter transportation benefits from $720 to $1,000 for tax years beginning on and after January 1, 1997. (The Director is required to annually adjust the limit based upon the change in the average consumer price index for all urban consumers in the New York, Northeastern New Jersey and the Philadelphia areas.)

The legislation also extends the expiration date of the employer credits from accounting periods ending on December 31, 2004 to accounting periods ending on December 31, 2007. This legislation is effective immediately.

P.L. 1996, c.124—Municipal Landfill Site Closure, Remediation and Redevelopment Act
(Signed into law on November 6, 1996) Provides for the remediation and redevelopment of municipal solid waste landfill sites under the terms and conditions of a redevelopment agreement negotiated by a developer and the State.

Under a redevelopment agreement, an eligible developer who closes and remediates the municipal solid waste landfill would be eligible for reimbursement of 75 percent of the costs of closure and remediation of the municipal solid waste landfill after the site is redeveloped, from payments derived from one half of the sales tax collected on non-exempt sales generated from any business located on the site.

To receive the reimbursement, a developer must submit an application, in writing, to the Director of the Division of Taxation for review and certification after the project is complete. The Director must review the request for certification on a timely basis. The Director is required to certify a developer to be eligible for the reimbursement if: (1) a place of business is located in the area subject to the redevelopment agreement for the purpose of making retail sales; (2) non-exempt items are regularly exhibited and offered for retail sale at that location; (3) the place of business is not utilized primarily for the purpose of catalog or mail order sales; and (4) the developer has entered into a memorandum of agreement with the Commissioner of Environmental Protection for the sound and proper closure and remediation of the municipal solid waste landfill located on the site of the redevelopment project and is in compliance with the memorandum of agreement.

The Act creates in the Department of Treasury a special fund to be known as the Municipal Landfill Closure and Remediation Fund and provides that upon approval of the certification for reimbursement by the Director, a special account be created for that developer. This legislation is effective immediately.

Public Question No. 2—Resolution to Fund Environmental Remediation Activities
(Approved by the voters on November 5, 1996) Amends Article VIII, Section II, of the State Constitution to provide that an amount equivalent to 4% of the revenue annually derived from the Corporation Business Tax, or any other State law of similar effect, be deposited in a special account which could be appropriated by the Legislature only for the following purposes and in the following manner:

(1) a minimum of one-half for funding the costs incurred by the State relating to hazardous discharge remediations;

(2) a minimum of one-third, dedicated until December 31, 2008, for funding or financing loans and grants for underground storage tank upgrades, replacements, closures and remediations; and

(3) a minimum of one-sixth, or a minimum of $5 million, whichever is less, for funding costs related to water quality monitoring, watershed planning, and nonpoint source water pollution prevention.

P.L. 1997, c.139—Corporations, Limited Liability Companies, Limited Liability Partnerships
(Signed into law on June 27, 1997) Amends and supplements various aspects of the law concerning certain domestic and foreign entities authorized to transact business in this State.

Sales and Use Tax

P.L. 1997, c.36—Professional Wrestling
(Signed into law on March 17, 1997) Recognizes professional wrestling events as activities in which the primary purpose of the participants is to provide entertainment for spectators rather than to engage in a bona fide athletic contest. The legislation removes professional wrestling from the regulation and control of the State Athletic Control Board, eliminating the taxes imposed by the Board on ticket sales as well as television and cable receipts. As a result, admission charges to professional wrestling events are no longer exempt from sales tax under N.J.S.A. 54:32B-3(e)(1). This legislation is effective immediately.

Spill Compensation and Control Tax

P.L. 1997, c.134—Tax Cap on Hazardous Substance Transfers
(Signed into law on June 27, 1997) Alters the formula by which owners and operators of major facilities for the storage of hazardous substances determine the maximum annual amount of spill compensation tax due on transfers of such substances. This statute is effective immediately.

COURT DECISIONS

Corporation Business Tax

Offset of Overpayment Against Deficiencies of Merged Corporations Denied

Sea-Land Service Inc. v. Director, Division of Taxation, 16 N.J. Tax 132 (Tax Ct. 1996). Sea-Land Service, Inc., plaintiff, was the wholly-owned subsidiary of Sea-Land Corporation (Parent), and the parent of its own wholly-owned subsidiary, Reynolds Leasing Corporation (RLC). Sea-Land Corporation and Reynolds Leasing Corporation were each merged into Sea-Land Service, Inc. Sea-Land Service, Inc. became liable for tax deficiencies of Sea-Land Corporation and Reynolds Leasing Corporation as a result of the mergers. The Division also determined that plaintiff had a pre-merger overpayment which exceeded the tax liabilities of the merged corporations which were paid by plaintiff.

Plaintiff and the Director agreed that plaintiff was out of time under N.J.S.A. 54:49-14 for a refund of the overpayment. However, plaintiff argued that the tax liabilities of the merged corporations should have been offset against plaintiff's overpayment pursuant to N.J.S.A. 54:49-16. Under N.J.S.A. 54:49-16, an offset is permitted where an audit finds an erroneous overpayment of a tax, a deficiency was assessed against the taxpayer for the same audit period, and both the deficiency assessment and the overpayment arise under the same State tax.

The sole issue, according to the Court, was whether plaintiff was the same taxpayer involved for the purpose of offsetting the tax deficiencies with plaintiff's overpayment. The Court held that the three corporations, plaintiff, parent, and RLC were separate entities at the time when the deficiencies arose and the overpayment was made. Plaintiff could not now claim that its current status as a single entity was retroactive to that time. Business Corporation Law provision N.J.S.A. 14A:10-6, requiring a successor corporation to possess the rights and privileges of merged corporations, was held to have no bearing on the tax laws. The Court held that the deficiencies of the other two entities could not be offset against the plaintiff's overpayment, and granted summary judgment on behalf of the Director.

Cigarette Tax

Surety Obligations Continue Under Altered Payment Agreements

Selective Insurance Company of America v. Director, Division of Taxation, Superior Court of New Jersey, Appellate Division, decided April 16, 1997. Selective Insurance Company of America ("Selective"), plaintiff-appellant, was surety on a bond issued to the Division of Taxation, defendant-respondent. M&R Tobacco and Candy Company ("M&R"), defendant-respondent, a licensed cigarette distributor, was the principal on the bond. The bond secured M&R's financial obligations to New Jersey arising from credit purchases of cigarette tax stamps beginning in 1982.

In 1990, the Revenue Accounting Branch of the Division of Taxation discovered that M&R missed some of its tax stamp payments for that year. A unique weekly payment program was arranged that included interest and penalties. After several weeks, M&R began missing the weekly payments as well as payments on invoices for additional tax stamps. Finally, on March 22, 1991, after M&R missed payments on a revised payment program, the Division demanded payment of the total amount owed. M&R filed for bankruptcy the same day.

Selective sought to be discharged from their obligations as surety by bringing an action against the Division. Selective argued that their obligation was extinguished when the Division and M&R altered the terms of M&R's obligations. Selective further argued the alterations consisted of the payment extension beyond the thirty-day limit contained in N.J.S.A. 54:40A-13, the charging of interest on the initial default and the additional credit sales to M&R.

The Trial Court stated that the Director of the Division may revoke a distributor's credit privilege, for cause, at his discretion under N.J.A.C. 18:5-3.19. The Court therefore found that delinquent payments do not automatically suspend the distributor's privilege to make further credit purchases.

However, the Trial Court said that the Director lacked the authority to grant M&R an "extension of time to pay" for stamps purchased on credit. The Trial Court found that Selective was in fact discharged but only for the amount by which it was harmed by the extension. Therefore Selective was responsible for M&R's indebtedness, the total purchase price of all the tax stamps, but not for the interest and penalties.

The Appellate Division affirmed the Trial Court's judgment but did not view the payment program as an "extension," but rather, as an attempt to collect an overdue tax. According to the Appellate Division, N.J.S.A. 54:53-10 authorizes the satisfaction of a compromised amount owed to the State through installment payments.

Gross Income Tax

Credit for Tax Paid to Other Jurisdiction - Income from Non-New Jersey S Corporation
Sutkowski v. Director, Division of Taxation, 16 N.J. Tax 231 (1996). Plaintiff was the sole shareholder of a New York S corporation. New Jersey did not recognize S corporations until 1994. Therefore, for New Jersey gross income tax purposes, a distribution that was made to plaintiff during 1991 was taxable by New Jersey as dividend income for 1991. However, this distribution was not taxable by New York for 1991 because it was not part of plaintiff's pro rata share of the S corporation's income in that year. New York taxed plaintiff on the income realized by the S corporation, which was allocated to plaintiff in 1991, but was not yet distributed to him during that year.

At issue was whether, in calculating credit for taxes paid to New York, plaintiff could include the 1991 S corporation distributions as income taxed by New York State in 1991. The Court concluded that because this distribution was subject to New Jersey tax but not to New York tax in 1991, it was includable in the denominator, but not in the numerator, of the fraction used in determining the maximum credit allowed:

$$\frac{\text{Income subject to tax by other jurisdiction}}{\text{Entire New Jersey income}}$$

Determination of New Partnership Income
Sabino v. Director, Division of Taxation, 296 N.J. Super. 269 (App. Div. 1996). The Appellate Division reversed a Tax Court decision, published at 14 N.J. Tax 501 (Tax Ct. 1995), regarding the kinds of costs and expenses that are deductible for purposes of determining net partnership income. N.J.S.A. 54A:5-1b allows net income of a business to be determined "after provision for all costs and expenses incurred in the conduct thereof...."

The lower court, relying on *Smith v. Director, Division of Taxation,* 108 N.J. 19 (1987), ruled that deductible expenses included, literally *all* and any costs and expenses, provided that they were incurred in the conduct of the partnership's business. Concluding that the Tax Court had misconstrued *Smith,* the Appellate Division determined that, in arriving at a partnership's net income, only costs and expenses incurred *in the ordinary course of its business* are to be applied against income earned in the ordinary courses of its business.

The Appellate Division remanded the case to the Tax Court for determination of whether deductible "ordinary" business expenses are limited to ordinary and *necessary* business expenses and whether the amended regulations drafted by the Division are appropriate. Noting that N.J.S.A. 54A:5-1a allows net income to be determined "in accordance with the method of accounting allowed for federal income tax purposes," it declined to rule directly on the complicated questions involving the extent to which the Division can rely on federal taxing principles. It commented that this issue should be resolved by the lower court.

Timely Refund Claims
Charles C. Carella v. The State of New Jersey, Department of Treasury, Superior Court of New Jersey, Chancery Division: Essex County, decided May 20, 1997. Plaintiff sought to recover $2,259,820 in New Jersey gross income taxes voluntarily paid by Eddie Antar ("Crazy Eddie") to the State of New Jersey for the years 1984 through 1987. Plaintiff also sought to recover $8,652.60 and $62,378.98 for gross income taxes paid for 1984 and 1986, respectively. Antar filed several refund claims prior to plaintiff's action here.

The Court first pointed out that N.J.S.A. 54A:9-8(a) states that written refund claims need to be filed within three years of the filing of tax returns or two years after the actual payment of those taxes. The Court further offered that *Vivoca v. Director, Division of Taxation,* 116 N.J. Super. 496 (App. Div. 1979), says the filing of a refund claim with respect to interest and penalties assessed by the Director must be filed within ninety days of the assessment. In accordance with those authorities, the Court found that the only amount with respect to which Antar filed a timely refund claim, and thus the only amount the Court could consider in this action, was $11,943.80.

Plaintiff further claimed that no nexus existed between Antar and New Jersey and therefore the assertion of New Jersey's power to tax Antar's income earned elsewhere was a violation of the Due Process Clause under the Fourteenth Amendment to the U.S. Constitution.

The Court disagreed, finding that New Jersey's retention of Antar's tax payments did not constitute a violation of his due process rights. The Court explained that New Jersey did not reach beyond its borders to assess or collect the tax, but rather, the jurisdiction to tax was conferred on New Jersey by Antar's *voluntary* payments to the State.

Plaintiff also argued that, as a violation of equal protection, New Jersey did not grant Antar, as a supposed nonresident, a credit against their gross income tax obligation for taxes paid to another jurisdiction which it grants to its residents.

Rejecting plaintiff's argument, the Court stated that New Jersey imposes a tax, without credit, on New Jersey source income on both its residents and nonresidents. The credit plaintiff was concerned with is for taxes paid to other jurisdictions by New Jersey residents which New Jersey has the authority to tax without offering a credit at all. Nonresidents are not offered a credit by New Jersey for taxes paid to other jurisdictions because the State has no jurisdiction to tax nonresidents on non-New Jersey source income in the first place.

Based on the Court's findings, all of plaintiff's claims were dismissed.

Taxability of Distributions from Non-Qualified Investment Funds

Colonial Trust III v. Director, Division of Taxation, decided February 21, 1997; Tax Court; No. 009777-93. This was a declaratory judgment action to determine whether N.J.S.A. 54A:6-14.1 violates 31 U.S.C.A. §3124(a) and the Supremacy and Borrowing Clauses of the United States Constitution. N.J.S.A. 54:A:6-14.1 excludes from gross income certain mutual fund distributions attributable to interest or gain from exempt Federal obligations or exempt obligations of the State of New Jersey or its agencies and subdivisions. However, by the terms of this provision, the exemption applies only when the fund making the distributions is a "qualified investment fund." In order for the State to determine that it is a qualified investment fund, the fund would have to have at least 80% of its investments in exempt obligations. If a fund did not satisfy these criteria, it would not be a qualified fund, and under the terms of the statute, its distributions would not be excludable from gross income.

At issue in this case was whether the State has the power to limit the immunity of Federal obligations from state taxation, or whether instead the scope of Federal obligation immunity is grounded in the Federal constitution and therefore not subject to limitation or definition by a state. The Tax Court determined that the State did not have the power to set conditions for the immunity of Federal obligation income. Consequently the State is barred from using the conditions set forth in N.J.S.A. 54:A:6-14.1 in order to impose tax on Federal obligation income paid by non-qualified investment funds. The Court's holding was based on its interpretation of the Federal immunity statute, 31 U.S.C.A. §3124, and its analysis of the nature of mutual funds.

31 U.S.C.A. §3124(a) provides, in relevant part, that "[s]tocks and obligations of the United States Government are exempt from taxation by a State or political subdivision of a State. The exemption applies to each form of taxation that would require the obligation, the interest on the obligation, or both, to be considered in computing a tax...." The Court noted that this statutory immunity is rooted in the Supremacy and Borrowing Clauses of the United States Constitution and a long line of Supreme Court case law construing these clauses. The Supremacy Clause, U.S. Const., Art. VI, cl.2, provides that the Constitution and Federal laws enacted pursuant to it are the "supreme law of the land." The Borrowing Clause, U.S. Const. Art. I, §8, cl.2, provides that Congress has power to borrow money on the credit of the nation.

The Division argued that while Federal obligation income received by a mutual fund was nontaxable to the fund, in its capacity as a corporation, the character of the Federal obligation income did not flow through to the shareholders who then received income from the fund itself. The Tax Court rejected that argument, finding instead that mutual funds are structured and intended to be investment conduits and that their function as conduits must control the way their shareholders are taxed by the states. The Tax Court cited numerous court decisions of other states using the "conduit" analysis.

The Tax Court held that 31 U.S.C.A. §3124 requires that distributions paid by a mutual fund must be immune from New Jersey gross income tax to the extent that they are attributable to interest earned on Federal obligations. Therefore the imposition of tax on Federal obligation income distributed by "non-qualified" investment funds, pursuant to N.J.S.A. 54A:6-14.1 read in conjunction with N.J.S.A. 54A:5-1(e) or (f), is barred by Federal law. The Court explicitly limited its holding to mutual funds, specifying that it had no effect on the taxation of dividends paid by traditional C corporations not designed as investment conduits.

The Division is not appealing this decision. Taxpayers who might have refunds as a result of this decision should be mindful of the three-year statute of limitations.

Local Property Tax

Business Retention Act
General Motors Corporation v. City of Linden, Docket Nos. A-106 September Term 1996, decided July 21, 1997. The Supreme Court held that the Business Retention Act, Public Law 1992, c.24, was constitutional because it may reasonably be interpreted in a manner that does not create an unconstitutional exemption for real property from taxation that would favor business or industry.

General Motors appealed assessments on its automobile assembly plants made by the City of Linden for the 1983, 1984 and 1985 tax years. The Appellate Division remanded the case to the Tax Court for consideration of whether the Business Retention Act applied to the case.

The Business Retention Act excluded from taxable real property personal property affixed to real property or appurtenant to real property, when that personal property is machinery, apparatus or equipment “used or held for use in business,” which is not a “structure” or equipment whose purpose is to support, shelter or enclose persons or property.

The Tax Court held that the Act was unconstitutional because it violated the Uniformity Clause of the New Jersey Constitution, Art. VIII, sec.1, par.1(a), which mandates that all real property must be assessed and taxed locally according to the same standard of value, and that real property must be assessed for taxation under general laws and by uniform rules. The Appellate Division reversed the Tax Court and held the Act to be constitutional on the grounds that the subject of the Act was not real but personal property, and that since the legislature can classify personal property, the goal of restricting the scope of the definition of fixtures did not violate the Constitution.

The Supreme Court granted Linden’s motion for leave to appeal and found the Act to be facially constitutional. The Court found that the Act was presumed to be constitutional, and that the legislature intended to be faithful to the common law recognition that certain forms of personal property are so affixed to real property as to be considered part of the real property. The Court noted that the legislative history suggested that the exclusion for machinery and equipment from local taxation was not intended to override the more traditional test for the classification of real and personal property in circumstances in which affixed personal property would otherwise be taxable as real property. Finally, the Court observed that its decision did not foreclose challenges to the Act as applied.

Lacked Standing To Intervene In Appeal
Mobil Administrative Service Co. v. Mansfield Township, 15 N.J. Tax 583 (1996). In June, 1995, Mobil filed complaint with Tax Court appealing a Judgment of the Warren County Board of Taxation affirming the 1995 assessment on its property. On August 30, 1995, Mobil entered into a contract to sell the property to Zeta Consumer Products Corp. The Contract of Sale made no reference to the pending appeal and provided that local property taxes would be apportioned as of the closing date, September 27, 1995.

Zeta, by letter dated December 22, 1995, advised Mobil’s attorneys that it wished to be involved in settlement of the appeal. In January, Zeta requested from Mobil a copy of the appeal complaint and wanted to discuss “joint prosecution of the case.” They also contacted Mansfield Township requesting a meeting to discuss the 1995 assessment. On March 5, 1996, Zeta filed its motion to intervene.

Between January 24, 1996 and March 13, 1996, Mobil and Mansfield Township reached a settlement reducing the 1995 assessment. A Stipulation of Settlement was submitted March 29, 1996 but not processed pending decision of Zeta’s motion. The motion would be granted only if Zeta had standing to intervene, and such intervention did not violate statute of limitations or filing deadline, and the application satisfied the requirements of R. 4.33.1 which provides “Upon timely application anyone shall be permitted to intervene in an action if the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

Tax Court determined that Zeta lacked standing to intervene and the motion was denied. As of the appeal deadlines Zeta was not a taxpayer within the meaning of the appeal statute, had no interest in the subject property and no obligation to pay property taxes assessed to the property. Zeta contended such denial violated its constitutional right to protect and assert its interest in the property. The contention has no merit. When the requirements of due process were satisfied regarding a prior property owner then due process was satisfied as to a successor in title. Zeta’s failure to include provisions in the Contract of Sale requiring its consent to the resolution of any tax appeal to protect its interest cannot be remedied by intervening in Mobil’s appeal.

Additionally, the Court offered an analysis on other legal issues concerning Zeta’s motion, specifically the statute of limitations for property tax appeals and the application's compliance with the four criteria to satisfy R. 4.33.1.

Denial of Parsonage Exemption

Ehrlich, Richard J. & Devorah H. v. Passaic City, decided August 11, 1995; Tax Court of New Jersey; Pizzuto, J.T.C.; Docket Nos. 16-07-0201-91 & 16-07-13129-91. Rabbi and his spouse, as owners and occupants of their one-family dwelling, appealed Passaic City assessor's denial of their real estate tax exemption claim and contested the 1990 and 1991 assessments, affirmed by Passaic County Tax Board, to the Tax Court of New Jersey. Exemption had been claimed under N.J.S.A. 54:4-3.6 which, in part, excludes from property taxation "buildings, not exceeding two, actually occupied as a parsonage by the officiating clergymen of any religious corporation of this State…."

Taxing district's denial of parsonage exemption was based on the fact that the dwelling was not owned by a religious corporation for which the rabbi officiated, but rather by the rabbi and his wife as individuals. Homeowners argued that corporate ownership was not an absolute prerequisite and that the residence should be exempted as long as all other eligibility criteria were met.

Tax Court affirmed the denial of the exemption and held that N.J.S.A. 54:4-3.6 is limited to and exclusively concerned with institutional uses of property both owned and used by nonprofit organizations.

The Court's decision was predicated upon an analysis of the statute's construction — the historical changes made to textual content and grammatical structure since its origin in 1918, particularly for the following provisions, "…provided, in case of all the foregoing, the buildings, or the lands on which they stand, or the associations, corporations or institutions using and occupying them as aforesaid, are not conducted for profit…" and "The foregoing exemption shall apply only where the association, corporation or institution claiming the exemption owns the property in question and is incorporated or organized under the laws of this State and authorized to carry out the purposes on account of which the exemption is claimed…." For example, that an earlier wording of 3.6 required corporate ownership for each of the eleven categories of exempt property and specifically stated that a parsonage must be owned by a religious corporation helps to confirm the correctness of applying the general condition of corporate ownership in the current statute's second sentence to all the exempt property it addresses. The Court concluded that the deletion of the 1919 specific ownership requirement, the 1937 sentence division and the 1962 plural to singular changes did not prevent "other requirements of the second sentence," from limiting the parsonage exemption.

Prior cases also cited by the Court as helpful in reaching its determination were *Jersey City v. New Jersey Baptist Convention*, 18 N.J. Misc. 209, 12 A.2d 150 (State Bd. of Tax App. 1940), where exemption was denied because legal ownership vested in a supervisory entity rather than pastor's congregation. And *Jabert Operating Corp. v. Newark*, 16 N.J. Super. 505 (App. Div. 1952), where exemption required holding of legal title by nonprofit entity using property for specified use.

Local Assessor's C.T.A. Suspended

N.J. Division of Taxation v. David M. Gill, decided December 9, 1996; Director's Hearing; Richard D. Gardiner, Director, Division of Taxation. David M. Gill, certified tax assessor in Milford, West Amwell, Belvidere, Frelinghuysen, Hardwick and Pahaquarry, recently had his Tax Assessor's Certificate suspended pursuant to N.J.S.A. 54:1-35.29 for not filing N.J. Gross Income Tax Returns for 1988, 1989, 1990, 1993, 1994 and 1995.

N.J.S.A. 54:1-35.29 authorizes the Director to revoke or suspend any Tax Assessor Certificate for "dishonest practices, or willful or intentional failure, neglect or refusal to comply with the constitution and laws relating to the assessment and collection of taxes, or other good cause."

Failing to file State income tax returns is a disorderly persons offense under N.J.S.A. 54:52-6a if failure was reckless or negligent, or a crime of the third degree under N.J.S.A. 54:52-8 if the intent was to "defraud the State or to evade, avoid or otherwise not make timely payment of any tax…."

Investigation by the Division's Internal Security Unit resulted in Gill's submitting delinquent NJ-1040 returns in September 1996 including $1,270.12 in gross income tax payments. However, after review by the Gross Income Tax Audit Branch, Gill was assessed an additional $2,939.39 in tax, penalty and interest. The Internal Security Unit's review of the records as well as Gill's own testimony evidenced no previous requests for filing extension, mitigating circumstances or attempted compliance.

In imposing the suspension, Director Gardiner exhorted that this be a warning to all holders of Tax Assessor Certificates to conduct their professional and personal tax matters so as to promote public confidence in the integrity of the tax system.

Omitted Added & Omitted Assessments Denied
200 43rd Street, L.L.C. v. City of Union City, 16 N.J. Tax 138 (1996). Taxpayer appealed Hudson County Tax Board's judgments for a 1994 omitted added assessment and a 1995 omitted assessment on a 24-unit residential condominium to the New Jersey Tax Court. The omitted assessment and the added assessment procedures, N.J.S.A. 54:4-63.31 & .12 *et seq.* and N.J.S.A. 54:4-63.1 *et seq.*, allow for the taxing of property omitted from assessment through oversight and of property newly constructed or which loses exemption after October 1, respectively. Union City's assessor had valued the land at $237,500 for 1992 but had given the improvements zero value because a DEP moratorium on sewer connections for new construction had prevented completion of the living units and issuance of the certificate of occupancy. The 1992 land and improvement values remained in place for tax years 1993–1995.

In January 1994, the sewer moratorium ended and in October 1995 the assessor made omitted added assessments for the improvements for 1994 and 1995. A certificate of occupancy was issued in March 1996 indicating that the property was considered substantially ready for its intended use. When the taxing district acknowledged that added assessments were improper as no additions were made to the property in 1994 and 1995 only their standing as omitted assessments was reviewed by the Tax Court.

Canceling the omitted/added assessments for 1994 and 1995, the Tax Court held that omitted assessment procedures may not be used to correct errors in assessors' value determinations, nor to increase value because the basis of the prior assessment no longer existed. Although Union City's assessor could have partially valued the incomplete improvement and then made an added assessment when substantially completed, he decided to assign zero value to the buildings due to the sewer ban. The assessor's nonassessment of the improvements was not oversight but a deliberate judgment that they had no value.

Training Facility Denied Exemption
N.J. Carpenters Apprentice Training and Education Fund v. Borough of Kenilworth, 147 N.J. 171 (1996). The N.J. Supreme Court denied a $2.8 million training facility for apprentice carpenters a real estate tax exemption as a nonprofit school under N.J.S.A. 54:4-3.6. The High Court in reversing the exempt determination of the Appellate Division N.J. Superior Court affirmed the N.J. Tax Court's disallowance and that of Union County Tax Board and Kenilworth Borough assessor.

Owned and operated by the Federally tax exempt N.J. Carpenters Apprentice Training and Education Fund, the training center offered no academic courses and was not accredited; its program was, however, overseen by the U.S. Department of Labor. Apprentices who attended the training facility were taken into local unions and graduates were certified as journeymen carpenters. Apprentices who didn't achieve proficiency in a skill were not passed on to the next level of carpentry and were not eligible for pay raises.

The State Supreme Court reasoned that the legislative intent of 54:4-3.6's specific wording "school, academy, college or seminary" was a narrower interpretation of school as a primary or secondary school and the disputed training facility was not within that narrower meaning. A broader definition of school as all learning institutions which would have included the training center would have made the statute's specificity superfluous.

The Court in examining the Fund's board of trustees found that, although they had an independent fiduciary duty to promote the school's educational purposes, they were appointed by the construction industry's employers and unions and served at their will. The trust Fund was formed in 1969 by the N.J. State Council of Carpenters, the Building Contractors Association of N.J., other employers in the construction industry obliged per their collective bargaining agreements to contribute to the Fund, and the Fund trustees.

The Court also reviewed the financing of the Apprentice Training and Education Fund and concluded that the revenues generated were not related to educational costs but were based on a mandatory percentage of union employee wages. Assets totaled $9,684,000 and $5,000,000 in cash and marketable securities. While the assets were not to be distributed to the union or employers neither were they to be used for any purposes other than apprentice training and education.

The Court in its analysis often drew parallels to the case of *Textile Research Institute v. Township of Princeton*, 35 N.J. 218 (1961), in which a nonprofit research organization for the textile industry providing laboratory instruction to doctoral students many of whom were later employed by that industry was denied property tax exemption.

In ruling against exemption the Court held that the apprentice training facility benefited a particular profit-making sector of the economy, i.e., the construction industry, by providing more skilled workers to building companies and more members to labor unions, rather than benefiting the general public.

Sales Ratio Challenge
Bellemead Development Corp. v. Roseland Boro., Director, Taxation Division, et al., decided March 25, 1997; Tax Court of N.J.; Docket No. 000431-97. Corporate taxpayer challenged the Director, Division of Taxation's omission of what it felt was a usable sale for the assessment-sales ratio study from which the State school aid ratio and tax year 1997 Chapter 123 ratio for Roseland Borough was developed. The taxpayer did not request a direct review of its 1997 property assessment.

The singular issue was whether the taxpayer could obtain relief via a change in the composition of the ratio in a local property tax plenary proceeding prior to and independent of a tax appeal.

Citing prior case law, the Tax Court noted that Chapter 123 ratios create such a strong presumption of the taxing districts' common levels of assessment as to be conclusive in all but the most egregious circumstances. Absent proof of error, use of other than the Director's ratios violated statute.

The Court further noted, however, that a taxpayer has a constitutional right to timely appeal where erroneous data has "substantially skewed" a Chapter 123 ratio.

In this case, the taxpayer sought to have the Court amend the Chapter 123 ratio for all assessment appeals of the Borough across the board. Rather, when correcting an error the Court does not revise the average ratio but only applies the amended ratio to the taxpayer's assessment to determine his discrimination relief. In this way, other taxpayers may contest other sales and establish their own ratios under which they may obtain value reduction.

The Tax Court held that it had no authority in a plenary proceeding to change either the school aid or Chapter 123 ratio and dismissed the taxpayer's request.

Horse-Farm Amendments
William & Frances Brousseau v. Millstone Township, decided March 10, 1997; Tax Court of New Jersey; Docket No. 008450-95. At issue before the N.J. Tax Court was the proper interpretation of the Farmland Assessment Act's (N.J.S.A. 54:4-23.1 *et seq.*) "horse-farm amendments," L. 1995, c.276. The taxpayers' 12.06 acres had been denied farmland assessment for tax year 1995 by Millstone Township assessor solely by reason of "noncontiguity" based on the recent changes to the Act. Monmouth County Tax Board had affirmed the denial on appeal. The disputed property consisted of 2.06 acres of appurtenant woodland, 8 acres of permanent pasture for grazing horses and 2 acres of training area with a riding rink, dressage area and 6-stall barn.

Prior to the 1995 statutory amendments, grazing livestock without breeding them for sale was not a qualifying agricultural use, nor were boarding, rehabilitating or training livestock considered farming.

The horse-farm revisions expanded the definition of agricultural use to include grazing of livestock alone as an acceptable farm use as well as their training, boarding and rehabilitation.

The amendments also permitted "fees received for boarding, rehabilitating or training any livestock where the land under the boarding, rehabilitating or training facilities is contiguous" to other qualified farmland to be used to fulfill the minimum income requirements.

In denying the farm assessment for noncontiguity, the municipality contended that the taxpayers' entire 12.06 acres had to be contiguous to other qualified farmland in order to obtain the land value reduction provided under the Act as amended.

The taxpayers argued that the legislative intent of the amendments was to provide property tax relief to owners of horse farms, not to require land used in horse farming to be contiguous to additional (5) acres devoted to other agricultural or horticultural uses. They also argued that under the new amendments the 8 acres of grazing land was independently eligible for farmland assessment while the 2 acre training and boarding area qualified as contiguous to it. The 2.06 acres was stipulated to be appurtenant woodland dependent upon the qualification of the other 10 acres.

The Court decided in favor of the taxpayers giving the plain meaning of the statute weight. In doing so the Court reviewed both the legislative history of the statutory amendments in terms of the intent of their several revisions and their grammatical construction.

Exemption as Charitable Institution Denied
1711 Third Avenue, Inc. v. City of Asbury Park, 16 N.J. Tax 174 (1996). Taxpayer sought local property tax exemption in the N.J. Tax Court under N.J.S.A. 54:4-3.6 as an "entity organized exclusively for the moral and mental improvement of men, women and children or as an institution that cares for, treats and studies the '… mentally retarded…'" after Asbury Park assessor's $98,000 value determination was affirmed by Monmouth County Tax Board.

The property in question was a residential dwelling funded, in part, by H.U.D. under section 811 of the Cranston Gonzalez National Affordable Housing Act. The H.U.D. program provided housing and various support services to low income adults with mental health problems. H.U.D. required that each residence be organized as a nonprofit corporation having ownership of the property, in this case Third Avenue, Inc. H.U.D. further required that all operational, counseling and other assisted living services such as shopping, cooking, etc. be provided by a nonprofit sponsoring organization, that being Collaborative Support Programs of New Jersey (CSP). CSP then contracted nonprofit corporation Butterfly Property Management to draft leases, collect rents, and handle repairs and utility bills for its sponsored properties, i.e., Third Avenue, for a management fee of 7% of the tenants' rents. The two H.U.D. tenants paid 30% of their Social Security income, $110 and $115 per month, as rent to Third Avenue Corp.

Tax Court did not dispute the property's qualification under H.U.D.'s section 811 supportive housing program. The Court did, however, rule against the taxpayer for failing to substantiate conformance to the exemption prerequisites of N.J.S.A. 54:4-3.6.

To qualify for exemption under the "moral and mental improvement" clause of 3.6, Third Avenue Corp. would have to be organized exclusively for "moral and mental improvement" purposes. Citing *Planned Parenthood v. Hackensack*, the organizational test applied by this Court was whether the owning entity's purpose on its certificate of incorporation or corporate charter coincided with the purpose on its claim for exemption. The Court emphasized the distinction between an entity's organization and its operations and disagreed with an opinion in *Intercare Health Systems, Inc. v. Cedar Grove* that an entity's operations should be reviewed to determine if it is organized for exempt purpose. In contrast to its claimed "moral and mental" purpose, Third Avenue's incorporation certificate stated its organizational purposes were exclusively charitable and/or educational. Using *Schizophrenia Foundation of N.J. v. Montgomery Twp.* as a guide, the Court reasoned that while providing housing which met the physical, social and psychological needs of mental health services clients might be construed as moral and mental improvement purposes, the conclusion was not possible here because providing housing was not a stated purpose of Third Avenue Corp. The educational purpose failed too since there is no exemption in 3.6 for entities organized for general educational purposes; but is rather for buildings used as colleges, schools, academies or seminaries. The Court concluded that although Third Avenue was better organized for charitable purposes, it had "not offered the proper proofs nor made the necessary arguments to bring itself within the exemption for charitable institutions."

The Court stated that Third Avenue also failed to analyze its certificate of incorporation in relation to N.J.S.A. 54:4-3.6 with respect to property owned and used in connection with "'curriculum, work, care, treatment and study of …mentally retarded...'" Third Avenue had no curriculum of its own and carried out no work, care or treatment. Third Avenue only held title to the real estate.

Tax Court also noted that despite oral testimony indicating the organization operated at a deficit, no financial data was provided to confirm its nonprofit status. That an entity may operate at a loss does not establish that it is "'not conducted for profit.'" Third Avenue was remiss in not providing its and CSP's financial records over several years time, including an explanation of their mutual financial arrangements, government funds received, use of revenues, salaries paid, rents charged and eviction policies for nonpayment. Again, taxpayer failed to bring itself within exemption statute as a nonprofit organization.

It is not the Court's function to make appropriate arguments to bring the appellant within exemption requirements. The burden of proving tax exempt status is upon the claimant.

Superintendent's Residence Denied Exemption
Pompton Lakes Senior Citizens Housing Corp v. Borough of Pompton Lakes, 16 N.J. Tax 331 (Tax Ct. 1997). The State Tax Court denied a "charitable purposes" real estate tax exemption per N.J.S.A. 54:4-3.6 on the superintendent's residence in a low income senior citizen housing complex where the complex qualified for abatement and paid in lieu of taxes for municipal services under N.J.S.A. 40A:20-1 *et seq.*, the Long Term Tax Exemption Law and N.J.S.A. 55:14K-37 *et seq.*, the Housing and Mortgage Finance Agency Tax Exemption Law. Both the superintendent's residence and the housing complex were owned by a nonprofit corporation formed as provided by N.J.S.A. title 15A.

The superintendent was a full-time resident responsible for overseeing all custodial, maintenance and grounds workers for the 100 unit complex and for providing emergency access to police and first aid squads when needed. Each apartment's alarm system was also wired to the superintendent's residence.

Under N.J.S.A. 54:4-3.6, residential property owned and used by otherwise exempt charitable, religious or hospital organizations can be exempt only derivatively through those organizations. The two-fold test established in *Clinton Twp. v. Camp Brett-Endeavor* requires that a residence be predominately used as an integral part of the exempt organization's operations rather than as a convenience to the occupant and that it be reasonably necessary for the proper and efficient operation of the exempt organization. Despite the fact that the housing complex had not applied for or received the necessary exemption under 3.6, the housing corporation contended that the residence fulfilled a charitable purpose and met both test criteria in *Camp Brett-Endeavor*.

Denying the exemption, Tax Court conceded that the superintendent's residence was an integral part of the housing complex's operation and reasonably necessary for its efficient operation. However, although the housing corporation's purposes were commendable and the apartment complex filled a significant need for housing, the exclusive charitable organization and use requirements of 3.6 were not met. According to the Court, the corporation's purpose "to plan, sponsor, construct, operate, maintain…housing projects for the senior citizens of Pompton Lakes on a non-profit basis" did not express, contemplate or require charitable purpose. Its non-profit and Federal tax exempt status also did not guarantee charitable purpose. Neither was the housing complex put to charitable use because it did not relieve government of the burden of subsidizing tenants and rents were equal to or slightly higher than fair market rent. In *Salt & Light Co., Inc. v. Mount Holly Twp.,* it was ruled that receipt of government funds did not disqualify a charitable entity from exemption as long as it at least partly relieved a burden on government. This housing corporation subsidized no rents.

Because the housing complex did not qualify for charitable exemption under N.J.S.A. 54:4-3.6, the superintendent's residence cannot qualify on a derivative basis.

Sales and Use Tax

Nonresident's Exemption on Purchase of Motor Vehicle

Furmato v. Division of Taxation, 16 N.J. Tax 10 (1996). At issue was whether the purchaser of a motor vehicle in New Jersey was entitled to an exemption from sales tax as a nonresident of this State. At the time of the purchase in 1993, Furmato certified that he was a nonresident, and therefore the dealer did not charge him sales tax on the automobile. The Division later assessed sales tax, based on its determination that Furmato was a resident.

Furmato, who had been a resident of New Jersey for many years, had moved to Florida in 1990. However, he and his wife returned to the State each year since then, living for approximately five months every year in a house that had been in the wife's family for many years, which had become hers some time before Mr. Furmato's purchase of the automobile, and which the two of them furnished and maintained jointly. Mr. Furmato had a telephone listing at the New Jersey location and received mail there, and he and his wife had a checking account at a New Jersey financial institution.

The Tax Court strictly construed the sales tax exemption for purchases of motor vehicles by nonresidents provided by N.J.S.A. 54:32B-10(a), and determined that Furmato did not qualify as a "nonresident," as defined by the administrative regulation, N.J.A.C. 18:24-7.8(b)(1), clarifying the scope of the statutory exemption. The regulation makes it clear that the buyer of a motor vehicle is a "resident" if he "maintains a place of abode in New Jersey… other than a temporary or transient basis." The Court found that, because Furmato had been returning to New Jersey to spend several months at the house every year since 1990, his maintenance of the place of abode in this State was more than just temporary or transient.

The Court also pointed out that the fact that Furmato had paid use tax on the car to Florida did not alter his liability for sales tax to New Jersey. Once he paid the sales tax properly due to New Jersey, he would be able to present documentary evidence of that payment to Florida, in order to claim a credit under Florida use tax law for the sales tax paid to New Jersey.

Alarm System Services and Telecommunications

Aetna Burglar & Fire Alarm Company v. Director, Division of Taxation, Tax Court of New Jersey, decided May 15, 1997. Aetna Burglar & Fire Alarm Company appealed a sales tax deficiency assessment imposed on its receipts from its services including the installation, servicing and monitoring of fire and burglar alarm systems. Aetna did not collect or remit any sales tax during the assessed period, July 1, 1991 through June 30, 1994.

The issue presented before the Tax Court was whether Aetna's services were "telecommunications" within the meaning of N.J.S.A. 54:32B-2(cc) and, if so, are subject to sales tax pursuant to N.J.S.A. 54:32B-2 & 3.

Aetna's alarm systems are connected to customers' phone lines and transmit electronic messages to a central station for both regular "check-ups" and emergencies. The phones are also used by Aetna employees to check with the customer to see if the incoming signal was caused by a real emergency.

Aetna argues that the monitoring of burglar and fire alarm systems is not within the ambiguous statutory definition of "telecommunications," and is therefore not subject to the sales tax.

The Tax Court found that while N.J.S.A. 54:32B-2(cc) enumerates five exclusions to its definition of telecommunications, the monitoring of burglar and fire alarm systems is not one of them. The Court further added that the phrase "*including but not limited to,*" used in addressing these taxable services, supports a legislative intention to include services such as Aenta's in the definition of telecommunications.

Aetna further argued that since it charges a flat monthly monitoring fee, rather than a charge per call, the use of a telephone is incidental to the service provided and is therefore not subject to taxation.

The Court responded by stating that without the ability to notify the central station of an intruder, fire or any other emergency, Aetna's monitoring service would be useless. The Court concluded that the use of the telephone cannot be considered incidental because Aetna's service heavily relies on it.

Partial summary judgment was granted to the Director, while another trial will be scheduled to see if the amount of tax assessed by the Director was correct.

Taxability of Sweeping Service
D.P.S. Acquisition Corp. v. Director, Division of Taxation, 16 N.J. Tax 292 (1997). Taxpayer, which was in the business of sweeping parking lots with a vehicle that was capable of sweeping up dirt and collecting it in a container which could then be emptied into customers' dumpsters, appealed from a determination that it was liable for sales tax on its sales of this service. At issue was whether the sweeping should be treated as a taxable service of "maintaining real property" or as a service of "garbage removal" which is exempt if performed on a regular contractual basis for a term of at least 30 days. N.J.S.A. 54:32B-3(b)(4).

The Court determined that, although taxpayer might carry out the dirt collected in the vehicle's container and dump it elsewhere, the garbage removal aspect of its service was only incidental to its primary service of sweeping. It therefore held that the sweeping service was a maintenance service subject to sales tax and that the garbage removal exemption did not apply.

Untimely Refund Claim
Toys R' Us, Inc. v. Director, Division of Taxation, 300 N.J. Super. 163 (1997). Toys R' Us, plaintiff-appellant, ships goods with labels already affixed to its retail outlets where additional price labels are affixed. In 1990, a field agent of the Division, defendant-respondent, conducted an audit of Toys R' Us' records for the period between April 1, 1985 and September 30, 1988. On April 15, 1991, Toys R' Us paid $463,000 in additional taxes that the Division assessed on February 28, 1991 as a result of the audit.

Toys R' Us sought to recover $99,000 of the additional taxes which was attributable to taxes imposed on the sale and use of labels during the audited period. The Court stated that the field agent relied on an opinion from the Director, appearing in a 1981 edition of the *New Jersey State Tax News*, interpreting N.J.S.A. 54:32B-8.15. The statute exempts wrapping supplies, including labels, from the sales and use tax. Based on that opinion, the field agent determined that Toys R' Us' price labels were still in fact taxable.

In the March/April 1991 edition of the newsletter, the Division stated that it had taken the position that price labels were now exempt. Toys R' Us filed a refund claim in July 1991, five months after the Division's assessment against them. Pursuant to N.J.S.A. 54:32B-19, the Division denied the refund because the claim was not filed within thirty days of the Division's determination (extended to 90 days in 1992). The Tax Court agreed with the Division.

Toys R' Us argued that the claim was timely because it was filed within the six-month period in which the Division could have assessed additional taxes. Toys R' Us also argued that the Tax Court judge erred because he considered the date when Toys R' Us learned of, and not when the Division adopted, the corrected exemption policy.

The Appellate Division agreed with the Tax Court finding that the claim was untimely. Although the Division could still have assessed additional taxes, the subsequent six-month period during which the taxpayer may file a claim only applies if the taxes were volunteered by the taxpayer rather than assessed by the Division, N.J.S.A. 54:32B-27(c).

The Appellate Division remanded the case to the Tax Court for further fact finding concerning the effective date of the Division's policy change in 1991.